No. 82-2048

In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY MEEKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner waived a statute of limitations defense by executing express waivers of that defense prior to the expiration of the limitations period.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-2048

JERRY MEEKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 701 F.2d 685.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1983. A petition for rehearing was denied on April 13, 1983 (Pet. App. A11). The petition for a writ of certiorari was filed on June 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiracy to defraud the government, in violation of 18 U.S.C. 371 (Count 1), 13 counts of making false statements, in violation of 18 U.S.C. 1001

(Counts 2 through 14), and 23 counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts 21 through 43). Pet. App. A1.[1] Petitioner was sentenced to concurrent terms of three years' imprisonment on each count (*ibid.*). The court of appeals affirmed (*id.* at A1-A10).

1. The evidence at trial (see Pet. App. A2-A3) showed that in 1975 petitioner worked as a manager of the student account center at Bell & Howell Schools, a subsidiary of the Bell & Howell Company. The student account center serviced loans guaranteed under the Federal Insured Student Loan Program, 20 U.S.C. 1071 *et seq.*, for students enrolled in the Bell & Howell vocational school system. Under the loan program, Bell & Howell was required, before it submitted a default claim to what was then the Department of Health, Education, and Welfare, to make reasonable collection efforts in the case of a student who failed to make loan payments. The collection schedule included a 120-day cycle of telephone calls and collection letters to the defaulting borrower.

By 1975, Bell & Howell Schools had accumulated thousands of delinquent accounts receivable representing millions of dollars in defaulted loans. These accounts presented cash flow problems and a potential for loss that caused concern to Bell & Howell management. Compliance with the 120-day "due-diligence" cycle prior to submission of the delinquent accounts to HEW would have exacerbated those problems. In late 1975 petitioner developed a scheme whereby Bell & Howell employees would create false "due diligence" records for submission to HEW. Petitioner and other employees forged entries describing telephone calls that were never made and letters that were never sent. In

---

[1]Petitioner's co-defendant Nicholas Dennis was acquitted on the same counts. Prior to trial, the district court granted the government's motion to dismiss Counts 15 through 20 of the indictment.

order to create the impression that each card contained entries by different persons, petitioner and the others used different colored pens and exchanged cards as they made the entries. They then used coffee stains and cigarette ashes to make the cards appear old.

2. In March 1981, a federal grand jury began to hear evidence on the fraudulent activity at Bell & Howell. The government faced the risk of having to forgo some potential criminal charges in connection with offenses that had occurred between August 17, 1976, and September 23, 1976, because of the imminent running of the five-year limitations period prescribed by 18 U.S.C. 3282. Accordingly, the government requested each target of the investigation to execute a waiver of the statute of limitations until September 23, 1981; in July 1981 each of the targets, including petitioner, signed such a waiver. The waivers were attractive to petitioner and the other targets because the government needed time to review Bell & Howell documents that might have exonerated some of the targets. On September 14, the government sought an additional one-month waiver from the targets because it needed more time to present its case to the next grand jury session scheduled for September 21-22, 1981. All of the targets signed waivers drafted by the government, except petitioner, who drafted his own version of the waiver. The government received a copy of petitioner's waiver on September 21, the day the grand jury began its September session. Petitioner was indicted on October 21, 1981. Pet. App. A3-A5.

Prior to trial petitioner sought to renounce his waiver on the ground that he never received an executed copy of the second waiver he delivered to the government.[2] The district

---

[2]Petitioner orally agreed to the substance of the second waiver on September 18 (Pet. App. A5). The United States Attorney then arranged for an agent to retrieve the executed waiver from petitioner's attorney on September 21, prior to the commencement of the

court concluded that petitioner's waiver was effective, since he had received the benefit of the agreement, which allowed the grand jury more time to consider documents that could have exonerated petitioner. The court concluded that the government's "administrative oversight" in failing to sign the waiver in no way prejudiced petitioner (Mar. 22, 1982, Tr. 21-23).

3. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A10). It rejected his contention that the statute of limitations poses a jurisdictional bar to prosecution and concluded that he had knowingly and voluntarily waived the defense in connection with the counts that might have been affected (*id.* at A5-A8, A10). In addition, the court concluded that the indictment adequately alleged an overt act in connection with the charge of conspiracy to defraud the government (*id.* at A8-A9). The court also noted (*id.* at A8 n.3) that petitioner was not adversely affected in any way by the alleged government breach of agreement in connection with the second waiver.

ARGUMENT

Petitioner contends (Pet. 4-23) that some of his convictions should be set aside on the ground that they were barred by the five-year statute of limitations, 18 U.S.C. 3282. Despite the fact that he executed formal waivers, petitioner urges that those waivers are ineffective because the statute of limitations operates as a "jurisdictional" bar to prosecution. The court of appeals properly rejected this claim, and no further review is warranted.

September grand jury session. The agent was unaware that petitioner's attorney had added a clause stating that a copy of the waiver was to be signed and returned to petitioner's attorney before October 1, 1981. Thus, the agent simply placed the waiver in the investigative file.

1. We note at the outset that even if the petition presented an issue worthy of this Court's consideration, this would be an entirely inappropriate case in which to grant review. Petitioner acknowledges that only 14 of the counts on which he was convicted would be affected by the contention he raises. Because he received concurrent three-year terms of imprisonment on close to 40 counts, the Court's disposition of the petition will not affect the length of petitioner's sentence. For that reason alone, review is not appropriate. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 791 (1969).

2. In any event, the contention that the statute of limitations is a jurisdictional bar to prosecution has been presented to the Court on several occasions in recent years, and the Court has denied certiorari on each occasion. See *Williams* v. *United States*, No. 82-5411 (Jan. 10, 1983); *Akmakjian* v. *United States*, 454 U.S. 964 (1981); *Wild* v. *United States*, 431 U.S. 916 (1977).[3] Thus, petitioner's contention appears to be of insufficient importance to warrant review.

Moreover, the decision of the court of appeals is correct. A number of courts have held that a defense based on the statute of limitations is waivable, either expressly or by failure to raise it in timely fashion at or before trial. See, *e.g.*, *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982), cert. denied, No. 82-5411 (Jan. 10, 1983); *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *United States* v. *Kenner*, 354 F.2d 780, 785 (2d Cir. 1965), cert. denied, 383 U.S. 958 (1966); *United States* v. *Franklin*, 188 F.2d 182, 196 (7th Cir. 1951); *Capone* v. *Aderhold*,

---

[3]A similar contention is pending before the Court now in *Walsh* v. *United States*, No. 82-2043.

65 F.2d 130 (5th Cir. 1933). See also *Holloway* v. *Florida*, 449 U.S. 905, 908-909 n.5 (1980) (Blackmun, J., dissenting from denial of certiorari); *Vance* v. *Hedrick*, 659 F.2d 447, 452 (4th Cir. 1981), cert. denied, 456 U.S. 978 (1982); *United States* v. *Levine*, 658 F.2d 113, 120 (3d Cir. 1981); 1 C. Wright, *Federal Practice and Procedure* § 193 at 705-708 (2d ed. 1982); 8 J. Moore, *Federal Practice* para. 12.03[1] at 12-17 to 12-18 (1982).[4]

---

[4]Several cases suggest that this Court regards the statute of limitations as an affirmative defense and not a jurisdictional requirement. See *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917) (declining to consider statute of limitations in habeas corpus proceeding on the ground that it is a defense and must be asserted at trial in the state courts); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872) (holding that criminal statute of limitations could not be raised by demurrer to the indictment). Cf. *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887) (noting in the context of a civil case that the statute of limitations generally can be waived by the parties).

The Tenth Circuit, in the context of a tax prosecution, has concluded in *Waters* v. *United States*, 328 F.2d 739, 742-743 (1964), that the statute of limitations is "jurisdictional" and therefore not waived when not raised at trial. Cf. *Benes* v. *United States*, 276 F.2d 99, 108-109 (1960), in which the Sixth Circuit, also in a tax case, concluded that a statute of limitations creates a bar to prosecution that cannot be waived by agreement of the parties. Neither *Waters* nor *Benes* involved circumstances similar to those in this case. It is unclear whether those cases would be decided in the same manner today. Cf. Note, *Waiver of the Statute of Limitations in Criminal Prosecutions:* United States *v.* Wild, 90 Harv. L. Rev. 1550, 1553-554 (1977); Note, *The Statute of Limitations in a Criminal Case: Can It Be Waived?*, 18 Wm. & Mary L. Rev. 823 (1977). Since *Waters*, this Court has denied certiorari in several cases involving this issue (see page 5, *supra*), and there is no reason to do differently here. If future cases suggest that *Waters* and *Benes* are still regarded as good law in their respective circuits, the Court can consider at that point whether review is appropriate.

In *United States* v. *Hankin*, 607 F.2d 611 (3d Cir. 1979), also cited by petitioner (Pet. 12), it is unclear whether the statute of limitations defense was raised at trial. In any event, the Third Circuit has made clear in the more recent case of *United States* v. *Levine*, *supra*, that it views the statute of limitations as subject to waiver.

There can be no doubt that petitioner in fact waived his statute of limitations defense. He executed an explicit and limited written waiver after consultation with counsel. See Pet. App. A4 n.2. Execution of the waiver was to petitioner's benefit because it was for the purpose of allowing prosecutors to review Bell & Howell documents that might have exonerated petitioner and other potential defendants. See *id.* at A3. Petitioner himself participated in drafting an additional one-month waiver and negotiated with the government about its terms (*id.* at A5). It is difficult to imagine a clearer instance of an effective waiver of a statute of limitations defense.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

AUGUST 1983

---

[5]Compare *United States* v. *Wild, supra,* 551 F.2d at 423-425. Petitioner appears to suggest in his statement of facts (Pet. 3-4) that his waiver became invalid because of the government's failure to sign and return to his counsel a copy of the second waiver. The court of appeals properly upheld the district court's ruling that the waiver was valid and that petitioner was not prejudiced in any way by the government's failure to sign the waiver (Pet. App. A8 n.3, A10).

DOJ-1983-08